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*Kevin L. Smith*

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of the supreme court,  
court of appeals and  
tax court

ATTORNEY FOR APPELLEE:

**PAUL A. LEONARD, JR.**  
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Merrillville, Indiana

**IN THE  
COURT OF APPEALS OF INDIANA**

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No. 45A05-0711-CV-632

**May 27, 2008**

**BARNES, Judge**

## **Case Summary**

Steven Evans appeals the trial court's treatment of marital debt and division of his marital estate in the dissolution of his marriage to Natalie Fabian Evans. We affirm in part and remand.

## **Issues**

Evans raises multiple issues on appeal, which we consolidate and restate as:

- I. whether the trial court abused its discretion by admitting testimony of Natalie's former criminal defense attorney regarding fees;
- II. whether the trial court abused its discretion in assigning \$25,000 of criminal defense fees to Natalie as marital debt;
- III. whether the accrued criminal defense and CHINS attorney fees amounted to a dissipation of marital assets;
- IV. whether the trial court abused its discretion in valuing a 1997 Chevy Blazer; and
- V. whether the trial court abused its discretion in dividing the marital estate.

## **Facts**

Natalie filed a petition for dissolution on April 17, 2003. Nearly two years earlier, on November 30, 2001, the Evans's adopted son L.E. died under circumstances that led authorities to contend their other son A.E. was a child in need of services ("CHINS"). The Evans hired attorneys Nick Thiros and T. Edward Page of the Cohen & Thiros law firm to represent them in the CHINS action. The representation fee in the CHINS case was \$10,000, which the Evans paid in full.

Steve and Natalie met with Page and Thiros when they learned that the Lake County prosecutor intended to file charges against Natalie for L.E.'s death. The meeting took place on December 16, 2002. The fee presented was a flat fee of \$50,000 plus expenses. Both Steven and Natalie agreed to the fee arrangement during the meeting. The couple paid an initial \$5,000 toward the fee at that time. Approximately four months later, Natalie filed her petition for dissolution. By the time the petition for divorce was filed in April of 2003, Page had likely spent enough hours working on the case to total about \$25,000 in fees. Natalie's parents contributed over \$46,000 toward the legal fees.<sup>1</sup> Page testified that at the time of the dissolution hearing, approximately \$9,900 in fees remained outstanding, but stressed that he was "not here as a collection case" and "we don't sue our clients." Tr. p. 64. Natalie was acquitted on June 20, 2006.

A dissolution hearing was held on February 27, 2007, the trial court announced its findings on February 28, 2007, and the trial court issued the dissolution decree on April 9, 2007. It found that the marital debts totaled \$62,714, including \$25,000 payable to the law firm of Cohen & Thiros. The trial court assigned this debt to Natalie along with approximately \$3,000 of additional debt. The trial court assigned Steven over \$27,000 in credit card and other debts. The trial court found that the marital estate was worth \$59,449 and awarded 55% of the estate to Natalie and 45% to Steven. The trial court also awarded Natalie 55% of Steven's pension.

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<sup>1</sup> The record is unclear as to when Natalie's parents made these payments. Attorney Page testified they paid about \$46,000 toward the legal fees and posted a \$10,000 bond, the proceeds of which also went to him.

Steven filed a motion to correct error in part pursuant Indiana Trial Rule 59(H), based on evidence outside the record. After the final hearing, Steven had subpoenaed Attorney Page in an attempt to gather documentary evidence of the CHINS and criminal attorney fees. Steven submitted the items gathered, an affidavit from Attorney Page and various billing records, with his motion to correct error. He also challenged the valuations of certain vehicles.

The trial court held a hearing on the motion on August 23, 2007. The trial court denied the motion and did not consider the additional evidence submitted. The trial court found that Steven had knowledge of the fee agreement and that the entire debt of \$50,000 was due at the time of the meeting with Natalie's attorneys, on December 16, 2002.<sup>2</sup> This appeal followed.

### **Analysis**

Because no request for findings and conclusions from either party appears in the record, the trial court entered findings and conclusions sua sponte. Under such circumstances, we will not set aside the findings and judgment unless clearly erroneous. Piles v. Gosman, 851 N.E.2d 1009, 1012 (Ind. Ct. App. 2006). A judgment is clearly erroneous if there is no evidence supporting the findings, or the findings fail to support the judgment, or if the trial court applies the wrong legal standard to properly found facts. Id. Although we review findings of fact under the clearly erroneous standard, we do not

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<sup>2</sup> Steven points out in his brief that the trial court incorrectly used the date December 7, 2002, instead of the 16<sup>th</sup>, and Natalie acknowledges the same. We agree with Natalie as she asserts that this scrivener's error does not alter the validity of the final conclusion.

defer to conclusions of law, which are reviewed de novo. Id. Because the findings and conclusions here were issued sua sponte, they control only the issues they cover, and we will apply a general judgment standard to any issues about which the court did not make findings. Id. A general judgment can be affirmed based on any legal theory supported by the evidence. Id.

### ***I. Admission of Testimony Regarding Attorney Fees***

Steven argues that the trial court abused its discretion in allowing testimony of Page regarding the CHINS and criminal defense fees. We review decisions regarding the admissibility of evidence for an abuse of discretion. Lee v. Hamilton, 841 N.E.2d 223, 227 (Ind. Ct. App. 2006). “An abuse of discretion occurs if the trial court’s action is clearly erroneous and against the logic and effect of the facts and circumstances before the court.” Id.

Steven contends that Page was not disclosed as a witness or properly included on the exchanged witness lists. He also argues on appeal that the debt to Cohen & Thiros was not disclosed in financial declarations or raised at the settlement conference. Generally, parties waive appellate review of an issue or argument unless that party presented the issue before trial court. Randles v. Ind. Patient’s Compensation Fund, 860 N.E.2d 1212, 1230 (Ind. Ct. App. 2007), trans. denied. Steven did not object to Page’s testimony on the grounds that he was not on the witness list, that the debt was omitted from declarations, or that the issue was improperly before the court. Page took the stand without incident and Steven did not make an objection until after the eleventh question asked by Natalie’s counsel—and that was an objection to the lack of documentation.

Steven raised these issues for the first time in his motion to correct error. Therefore, Steven has waived these arguments on appeal. See GKC Indiana Theatres, Inc. v. Elk Retail Investors, LLC, 764 N.E.2d 647, 654 (Ind. Ct. App. 2002) (an issue raised for the first time in a motion to correct error is waived).

Steven also contends the trial court abused its discretion in admitting testimony about the fees, because Page did not execute an affidavit or submit billing records. Steven specifically made an evidentiary objection to Page's testimony and the lack of documentation. At that time, the trial court allowed Steven's counsel to voir dire Page regarding the existence of any written agreements. The lack of a written fee agreement or accompanying documentation was not fatal to Page's testimony and Steven's counsel was able to cross-examine him at length. Cf. Carr v. Pearlman, 860 N.E.2d 863, 873 (Ind. Ct. App. 2007) (explaining that even an oral contingent fee agreement, which is against the professional rules of conduct, is not deemed illegal or void and still can be a basis for quantum meruit recovery), trans. denied. The existence of supporting documentation of this fee goes to the weight and not to the admissibility of the testimony and we do not reweigh the evidence. We conclude the trial court did not abuse its discretion in admitting this testimony.

## ***II. Criminal Defense Attorney Fees as Marital Debt***

Steven argues that the trial court abused its discretion by assigning a debt to the law firm of Cohen & Thiros of \$25,000 as marital debt. The trial court had found, following a motion to correct error, that an entire debt of \$50,000 to the law firm was incurred during the marriage. Yet, the trial court only included a portion of these fees,

\$25,000, in the marital debt and assigned those fees to Natalie. This amount matches the calculation of the hourly rate amount apparently accrued at the time Natalie filed the petition for dissolution. This identical match is problematic because the trial court specifically found that any attempt to treat the fees as an hourly rate in order to calculate the amount due at the time of filing the petition was inappropriate. Therefore, these findings and the conclusion are contradictory and erroneous.

Generally, the marital estate includes assets and liabilities and it closes on the day the dissolution petition is filed. McCord v. McCord, 852 N.E.2d 35, 45 (Ind. Ct. App. 2006), trans. denied. Separate debts incurred after that date are not to be included. Id. The trial court here failed to explicitly issue a finding as to how much debt was due to Cohen & Thiros on the date of the filing of the dissolution petition, April 17, 2003, and how much debt remained at the time of the hearing. Page indicated that Steven paid at least \$5,000 of the \$50,000 debt in December of 2002 and that Natalie's parents contributed an additional \$46,000 at some point. The evidence was unclear as to what debt actually remained due to Cohen & Thiros at the time of the petition. At the time of the dissolution hearing, Page testified that approximately \$9,900 was outstanding. Given the varied amounts of this potential debt, the trial court exceeded its discretion by assigning the arbitrary \$25,000 figure and failing to include any specific finding to support this conclusion. The \$25,000 total debt does not comport with the trial court's finding that "any attempt to treat the fees as an 'hourly rate' and thereby calculate the amount of fees incurred as of the date of filing is inappropriate." Appellee's App. p. 44.

Steven makes many alternative arguments as to why the inclusion of this marital debt is in error: (1) it has been paid in full; (2) the balance due, if any, is only \$9,900; or (3) the debt was a post filing obligation of Natalie's. As to whether the debt had been satisfied, Natalie argues that Steven is not entitled to benefit from the generosity of her parents who paid \$46,000 of attorney fees.<sup>3</sup> We find that payment to be relevant here, especially considering Page's testimony that his firm would not be suing Natalie to collect any monies.

Although we acknowledge that the trial court's decision in these matters is discretionary, we must remand for clarification. On its face, the split of the marital debts is 55-45, but in reality Steven bears a much higher burden. This inequality results because according to Page's testimony, the actual amount due to Cohen & Thiros at the time of the dissolution hearing was about \$9,900. He specifically testified that he was "not here as a collection case" and "we don't sue our clients." Tr. p. 64. Nor was any evidence presented to indicate Natalie's parents expect a reimbursement. Given this evidence, it seems quite unlikely that Natalie will be having to satisfy a \$25,000 (or possibly even a \$9,900) debt to the law firm, while Steven will clearly have to satisfy the approximately \$27,000 in credit card and other debts assigned to him. We remand for the trial court to revisit this debt issue and to divide the debt it finds due to Cohen & Thiros between the parties in an effort to maintain the 55-45 split. We do not opine as to precisely what that amount would or should be.

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<sup>3</sup> No testimony was entered that the couple owes Natalie's parents any money.



### ***III. Dissipation of Marital Assets***

Steven argues that the fees paid to Cohen & Thiros for the CHINS proceeding and the criminal defense amounted to a dissipation of marital assets. “Dissipation of marital assets includes the frivolous and unjustified spending of marital assets.” Grathwohl v. Garrity, 871 N.E.2d 297, 303 (Ind. Ct. App. 2007). First, we find no indication in the record that Steven asked the trial court to find that Natalie had dissipated assets. The failure to present this argument amounts to waiver of the issue for appeal. See id. at 302. Waiver notwithstanding, the evidence and testimony do not indicate the legal fees incurred by the couple amounted to a dissipation of assets by Natalie. We look to whether the assets were actually wasted or misused in determining whether dissipation applies. Id. at 303. The \$10,000 in attorney fees for the CHINS proceeding was for the benefit of both Steven and Natalie to protect their parental rights to A.E. In addition, the couple was still married when Natalie was charged with murder and they both agreed to incur her defense costs, which resulted in her acquittal. The trial court found that the entire debt of \$50,000 was incurred during the marriage and with Steven’s knowledge.<sup>4</sup> The evidence supports this finding. We conclude the legal fees incurred were not a dissipation of the marital assets.

### ***IV. Value of Chevy Blazer***

Steven contends that the trial court abused its discretion in assigning a value of \$1,500 to a 1996 Chevy Blazer. We review the trial court’s decision in assigning the

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<sup>4</sup> The trial court issued these findings in its September 12, 2007 order on the motion to correct error.

value of property in a dissolution for an abuse of discretion. Goossens v. Goossens, 829 N.E.2d 36, 38 (Ind. Ct. App. 2005). In support of this contention, Steven asserts that the Blazer should have been assessed more value than the trial court assigned to a 1967 Chevelle, which was also \$1,500. Natalie testified that the Blazer did not run and was parked in her parents' driveway. She opined that it might be worth about \$1,500. Given this testimony and the age of the vehicle, we cannot conclude that the trial court abused its discretion in making this valuation.

#### ***V. Division of Marital Assets***

Steven contends the trial court erred in deviating from a strict 50-50 split of the marital assets. The deviation from a 50-50 split was rather slight—55% to Natalie and 45% to Steven. Indiana Code Section 31-15-7-5 sets out the presumption of an equal division of marital property and the instances in which that presumption may be rebutted. Given the evidence admitted that Natalie's earning capacity was less than Steven's, any deviation is just and reasonable under the statute. See Ind. Code § 31-15-7-5(5) (evidence of the earning ability of the parties may rebut the presumption of equal property division). Though it is not included in the final decree, the trial court proclaimed that it used the disparity in income as a basis to deviate from the strict 50-50 split. See Tr. p. 231. We conclude that the trial court's deviation from a strict 50-50 split was not an abuse of discretion.

#### **Conclusion**

The trial court did not abuse its discretion in admitting Page's testimony, valuing the Chevy Blazer, or dividing the marital estate. We find that any issues regarding

dissipation of marital assets have been waived. We remand this case to the trial court for a recalculation and redistribution of the marital debt incurred regarding the legal fees payable to Cohen & Thiros. We affirm in part and remand.

Affirmed in part and remanded.

CRONE, J., and BRADFORD, J., concur.